Brian Muldoon Handouts

SJ 22

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Law and Justice Meeting
February 13 , 2014

Exhibit 18

TESTIMONY OF BRIAN MULDOON

February 13, 2014

Madame Chairwoman, and distinguished legislators:

I am most grateful to appear before you today to discuss what I think is an effective and powerful way to address the explosion in recent years of self-represented (*pro se*) litigants and the additional burdens it has placed on our legal system.

First, you should know that this phenomenon is not limited to the State of Montana or even to the United States. It is global and it is pervasive—throughout this country and everywhere there are courts. Why have so many litigants turned away from lawyers in an effort to represent themselves in court? Two factors come immediately to mind. First, the advent of the Internet and its resultant "do it yourself" ethic. This development has rocked the record business, the film industry, the newspaper business and just about every other business. We shouldn't be too surprised that it has turned the legal system on its head.

Second, the economic downturn of the past six years has convinced a majority of the public that lawyers are a luxury, not a necessity.

As a result, our courts have become overwhelmed by litigants who don't know how to navigate through the morass of rules, procedures and deadlines, who can't ask a simple question or properly offer a document into evidence during a contested hearing, and who require an enormous amount of hand-holding and guidance by court employees who are forbidden to give legal advice—only information.

In Flathead County Peg Allison, the Clerk of Court, estimated that the number of *pro se* cases has grown from about 500 in 2011 to over a thousand in 2013, and most of these involve parenting issues. And before 2000, there were perhaps fewer than 100 a year.

The initial response of the bench and the bar to the fact that so many people were unwilling or unable to pay lawyers was to increase the pressure on lawyers—who are already seeing a steep decline in their practices—to take on more *pro bono* representation. For all the bad rap lawyers sometimes get, this is the only profession I know that requires its members to work for free. In Montana, it's fifty hours of volunteer work each year. I am chair of the Flathead Pro Bono committee, and lawyers really get tired of hearing me nag them about volunteering their time, especially when so-called paying clients so often fail to pay. Every family law attorney has a huge accounts receivable that will never be collected.

Then we added free services for *pro se* litigants. In the larger communities, there are Self-Help Centers where folks can get assistance with filling out forms and filing motions. These services are available whether you're rich or poor. The idea was to help every litigant get his day in court. In this society, we are deeply committed to making the judicial process accessible to everyone. In the Flathead we even started offering free classes on how to prepare a case, how to examine witnesses and how to succeed in the courtroom. But perhaps we just made matters worse.

Perhaps we were just looking in the wrong direction for a solution to the problem. Our goal should <u>not</u> be "how can we help non-lawyers start acting like lawyers" or "how can we make sure everyone gets better at suing one

another." Litigation is not only expensive, but it's awful. And it's truly awful when the person we're suing is the other parent of our children. I think we started down the wrong road, however well-intentioned. Yes, everyone should have equal access to the courts. Yes, everyone should have the right to seek judicial relief when there's nowhere else to turn. But the courthouse should not be the first place we go for help. It should be the last—a true court of last resort.

Looking at the statistics, some 70-85% of contested *pro se* cases in Montana are disputes about the parenting of children. As it happens, those are the cases that most judges would rather avoid, and for which they are neither trained nor qualified. There is nothing in law school that teaches a lawyer how to discern which parent is the better parent, or whether it's best for a child to alternate weeks with each parent or spend alternating weekends, whether the fact that a parent spent the last three years in prison means he should have restrictions placed on his time with his children. The legal system isn't designed to handle these kinds of developmental and psychological issues. In 1998, the legislature enacted no-fault divorce, based on its recognition that the courts are not the place to settle moral questions like whether a spouse's adultery and spendthrift ways justified a divorce. Like every other state in the country we stopped making people fight about whose fault it was, and that was a huge step forward. And the legal system adjusted.

But fault hasn't gone away. Like a whack-a-mole, it migrated from dissolution issues into the realm of parenting. So now we don't attack dad for having an affair with the neighbor, but we still get to attack dad for being a narcissist or unreliable or a drunk. We tell the clients that they have to put aside their anger and their grief and focus only on the "best interest" of their

children—and then we send them into the courtroom arena to fight like gladiators. We do that despite the fact that this ALWAYS damages the children. Our system always puts the children in the middle because it pits mothers against fathers. It christens them as adversaries and tells parents that it's OK to shame and humiliate one another in a public venue. Even if a child is not directly in the middle—by having to tell a social worker or the judge which parent they like better—every child is forced to watch the two people she loves most in the world tear each other apart. And that traumatizes a child. You see it in their tattoos, their drug use, the dropout rate, their criminal history.

So what is the alternative?

The answer is simple: mediation. Not just sometimes, or when people get tired of the battle, or can't pay the lawyers, or are a few weeks away from a trial. But all the time—at least in the overwhelming majority of cases that involve children. And do it early, before they start enlisting the neighbors as witnesses and hiring psychologists to pathologize one another. And if mediation doesn't result in an agreement, get them to a special master to make a decision within thirty days or so. Because it's more important that the conflict end than that the result be perfect. And if they really object to the special master's decision, let them go to court. But those cases will be rare. And a last resort.

What we know about mediation is that good mediators can resolve 70-90% of their cases. And the clients are happier. Mediation clients comply with child support about 80% of the time, compared with 20% compliance when a court orders support. And mediation is also fast, because most of the time, people just need to know that their wild fantasies about running off with the

kids to Florida or trading the Jeep for parenting rights won't be allowed in the real world. They need to know that child support is calculated by a computer program and they don't get out of it by quitting their jobs. Most parenting disputes can be resolved in one or two sessions of two hours each. Lawyer-mediators can cobble together a written agreement in an hour or two. And the formal process of discovery that lawyers use to prepare their cases is almost completely unnecessary—there's very little that parents need to know about their children that they don't already know, at least for purposes of preparing a parenting plan. In some cases the evaluative services of a child psychologist may be helpful, but mediation allows the parties to work with the same psychologist instead of each hiring their own expensive testifying expert to say bad things about the other. And if they use the same expert, that allows the psychologist to actually help them co-parent a child, which is what most psychologists would rather do.

Mediation is already being used extensively in Montana. By statute, judges can appoint mediators in family law cases and litigants have to pay them. It's routinely used to settle personal injury and medical malpractice cases. But in parenting cases it is employed arbitrarily from judge to judge and district to district. Leaving it to a case-by-case basis is unlikely to be sufficient to make a dent in the court docket. And self-represented clients aren't familiar enough with mediation to hire a mediator on their own. If we are going to do something meaningful about the court backlog, then mandatory mediation is the only way to go.

But those who really benefit from mediation are not just the courts or even the parents, but, more importantly, the children. They didn't choose to have their parents break up. They are the ones who need the protection of a non-

adversarial system—even if the courts weren't too overwhelmed to hear their parents' cases. Court-annexed mediation would provide that protection.

The committee's deliberations should be guided by the language of M.C.A. §40-4-101, which establishes the purposes of Montana's marriage and dissolution statutes as being to:

(1) strengthen and preserve the integrity of marriage and safeguard family relationships;
(2) promote the amicable settlement of disputes that have arisen between parties to a marriage; and
(3) mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.

The legal system pits one parent against the other. Mediation brings them back together.

Our children deserve no less.

REPORT OF THE MEDIATION SUBCOMMITTEE
of the
JUSTICE INITIATIVES COMMITTEE

September 18, 2013

Formation and Mandate

The Mediation Subcommittee was launched at a meeting of the Justice Initiatives Committee on January 29, 2013 in Helena with the mandate to determine whether the increased use of mediation might partially alleviate the burden of the courts presented by the recent explosion of pro se litigation. Subcommittee members and staff include: Abigail St. Lawrence, Ann Davey, Anna Felton, August Swanson, Brian Muldoon, Charlotte Beatty, Chris Manos, Erin Farris, Janice Doggett, Kaitlyn Lamb, Justice Laurie McKinnon, Pamela Poon, Patrick Quinn, Patty Fain, and Stephanie Mann. Brian Muldoon served as chair.

Statement of Values

In an effort to establish a basic foundation for our work we first focused on creating a general Statement of Values for the use of mediation in family law matters, which comprise the vast majority of matters in which litigants represent themselves. Although it was anticipated that each judicial district may want to design its own program based on the needs, geography and unique dynamics of each district, our thought was that all such programs should be consistent with a common set of values.

The values we determined to be critical to the success of any such program are as follows:

1. *Early Resolution*. In family law matters, especially parenting issues, it is best to resolve the matter as early as possible.

2. *Outside the Court*. Parenting issues should be resolved outside the court system whenever possible, except in the case of harm or danger to the children or parents. We want to decrease the notion that going to court is what you want to do and increase the capacity to be able to work out the issue.

3. *Affordability*. To the extent possible, the parties should bear the reasonable cost of resolving their own parenting disputes. If the parties are unable to contribute meaningfully toward the reasonable cost of working out a parenting plan, then they should be encouraged to provide some other form of consideration to the community, such as an act of service for which they agree to be accountable. With that in mind, there should be a mechanism for providing conflict resolution services to all litigants, regardless of their financial resources.

4. *Proper Qualifications*. Mediators, whether lawyers or not, should be properly qualified to handle family law matters. While it is up to the individual mediator to choose the mediation approach that best suits the case, the mediator's style of family mediation should demonstrate a strong preference for facilitative or transformative mediation techniques.

5. *Oversight*. There should be an entity or person responsible for ensuring the quality of mediation services in a jurisdiction.

Mediator Qualifications

The success of a mediation program will depend, in large measure, on having truly qualified mediators handling the referrals. It is easy for someone with years of experience to feel that they know enough to help parties reach a settlement—but that often is not the case. More important than knowledge of the law, or even probable outcomes in court, is the ability to help emotionally-distraught couples come to a resolution that each is willing to accept and follow. That is not a skill that is usually developed without considerable training and experience. Based on a partial survey of mediation programs in other states, the trend in jurisdictions with a history of implementing such programs is to require more training, more experience, more exposure to the fields of child development, substance abuse, domestic violence and psychodynamics.

Because Montana is a relatively new actor in the field of dispute resolution, we elected to propose a set of qualifications that will allow the greatest number of trained mediators to participate in a court-annexed program. We suggest a two-year "grace period" to allow otherwise qualified mediators to complete the prescribed standards so that each jurisdiction can commence its own program as soon as

possible. In addition, a court can waive the qualifications in appropriate cases.

The suggested qualifications are as follows:

CERTIFIED FAMILY LAW MEDIATOR

The following qualifications should apply to any person who wishes to be appointed by the district court as a family law mediator under M.C.A. §§40-4-301 through 308 or similar local court provisions. Persons who meet these standards may be referred to as a "certified family law mediator."

For good cause shown, provided that a mediator meets the requirements of M.C.A. §40-4-307, and provided further that such person is in the process of satisfying the requirements set forth below and completes such requirements within two years of making application to the district court for listing under M.C.A. §40-4-306, such person may be listed as a "conditional family law mediator" and thereupon appointed by the district court.

The qualifications of the certified family law mediator shall be as follows:

TRAINING

All four of the following elements shall apply unless waived, individually or in total, by court order:

- 36 hours of basic mediation training (applicable to all forms of mediation); plus

- 20 hours of family law mediation (including substantive family law legal principles, family law litigation tools and parenting plans) and demonstrated familiarity with different mediation styles and their appropriate application; plus

- 16 hours of substance abuse and domestic violence training; plus

- 16 hours of family conflict psychology or family dynamics training, including principles of child development and the impact of divorce on children

EXPERIENCE
No fewer than ten (10) complete family law mediations (concluding in the entry of a decree of dissolution or the adoption of a final or modified parenting plan); plus

No fewer than five (5) complete parenting plans reviewed and approved by a certified family law mediator.

Financial Considerations

Obviously, one of the principal reasons that litigants choose to represent themselves is their inability to pay an attorney for legal services, so it is critical that we find a way to make such programs affordable. On the other hand, since funding for such programs is not easy to find these days, we believe that the parties can and should cover the costs of the mediation process. We anticipate that most parenting disputes can be resolved in one or two sessions of two or three hours, so the cost will be modest. We believe that each jurisdiction should adopt a sliding scale, based not only on the income but also the assets of the parties. Those who are entirely without means should be encouraged to make some form of in-kind contribution to the community as circumstances allow. Because certified mediators must invest in their own training and must make a living from their work, some form of meaningful compensation, where available, is essential to enable them to work at reduced fees or without charge.

We believe that most litigants can pay something, even if far less then they would if they retained counsel. Striking an equitable balance will determine the success of any such program.

Administration

Especially in more populous districts we expect that the number of cases referred to a mediation program will be significant. Because there may be a disproportionate number of low-paying (or non-paying) clients, it is important that an administrator fairly distribute the cases among the available resources. Because it is possible that some mediators may only wish to accept those cases that promise payment at his or her preferred rate, the program administrator should make sure that cases are equitably distributed, that mediators are properly

trained, that the necessary training is available, and should oversee case administration while the matter is outside of the judicial system. The administrator will also report back to the courts on the progress of cases referred into the system. We believe that a modest administrative fee charged to each party will support such an administrator.

A Sample Local Rule

In Flathead County a local rule has been proposed that would incorporate the considerations cited above. The rule has been presented to the current judges by retired judges Kitty Curtis, Stuart Stadler and attorney-mediator Brian Muldoon. It anticipates not only that parenting cases be referred to a certified mediator within thirty days, but that a special master be appointed to conduct a brief hearing if the matter is not successfully resolved in mediation. Again, the parties would bear the cost of the special master on a sliding scale. Either party could appeal the special master's proposed order, which would issue shortly after the hearing.

This rule is currently under discussion in the Flathead but has not yet been adopted. It has been proposed as a one-year experiment to determine if it can be self-supporting. Numerous questions were raised by the bar about the proposal, which were addressed in the attached response from its authors.

The text of the proposed rule is as follows:

DRAFT
PROPOSED LOCAL COURT RULE:
MEDIATION OF PARENTING ISSUES

1. All cases involving parenting of minor children not filed as a co-petition or with an agreed parenting plan shall be submitted to mediation through an entity designated by the Court for the administration of such matters within thirty (30) days of the filing of the initial petition (or filing of proof of service). The mediation shall be pursuant to Title 40, Chapter 4, Part 3, MCA. The mediator shall address with the parties the establishment of a parenting plan and, if applicable, child support. The mediator shall file a report with the Court setting forth solely the issues resolved through mediation.

2. If mediation does not result in the resolution of all issues between the parties, interim and/or final or modification of parenting and child support shall then be submitted to a special master appointed by the court pursuant to Rule 53, M.R.Civ.P. The master may refer the parties to Family Court Services, counseling, substance abuse evaluation and/or treatment, parenting classes or a domestic violence program.
3. Proceedings before the special master shall be governed by Rule 53, and the master shall, following final hearing, submit findings of fact and conclusions of law to the court. The court will then proceed as set forth in Rule 53(e)(2).
4. Mediators shall be properly qualified. Special masters must be retired judges with family law experience or attorneys with significant experience in family law.
5. Matters involving emergencies that may affect the health, safety or welfare of a child may proceed in accordance with this rule with safeguards implemented to insure children interests are protected, or may be exempted from this rule.
6. Fees for mediation and special master services must be reasonable in view of the parties' financial resources. (Reference Section 40-4-308, MCA.) A reasonable administrative fee may be charged to all parties. A mediator may find that a party acted in bad faith with respect to the mediation, in which event that party may recommend that party to be responsible for all costs, including the mediation costs. A special master may apportion costs of all proceedings in accordance with Montana law.

Conclusion

Perhaps at the heart of the explosion of pro se litigation is the conviction—which we as lawyers and judges have fostered—that justice requires that every litigant involved in a dispute with a spouse or fellow parent be afforded access to an adversarial system that pits mother against father. This inevitably and invariably puts the children in the middle. Even if this is justice from a procedural "due process" perspective, it often fails to produce substantively just outcomes.

Moreover, although lawyers are trained to convert emotional conflicts into fact patterns that are amenable to resolution by reference to legal principles, pro se litigants have no such training. In family law matters judges are often expected to play a very different role—that of stern "über-parent" who must decide, on the basis of very little evidence, what is best for a child the judge has never even seen.

Parents have a non-delegable duty to care for their children. That means they have to find a way to work through their anger, grief and

sense of failure. If they need to fight, let it be about dividing the retirement account or the furniture. Keep the kids out of it.

We believe that, together, mediators and the courts can help them to do exactly that.

MONTANA OUT OF COURT

Sliding Scale Fee Schedule for Mediation Services

(income only - no assets)

(fees are based on the 2013 Federal Poverty Guidlines)

FAMILY SIZE	100% poverty level **Pro Bono**	125% poverty level **$25/hr**	150% poverty level **$50/hr**	175% poverty level **$100/hr**	200% poverty level **$150/hr**	full prive **$200/hr**
	from to	**from to**	**from to**	**from to**	**from to**	**from to**
1	$0 - $11,170	$11,171 - $14,362	$14,362 - $17235	$17,235 - $20,107	$20,107 - $22,980	$22,981 and over
2	$0 - $15,510	$15,511 - $19,387	$19,388 - $23,265	$23,266 - $27,142	$27,143 - $31,020	$31,021 and over
3	$0 - $19,530	$19,531 - $24,412	$24,413 - $29,295	$29,296 - $34,177	$34178 - $39,060	$39,061 and over
4	$0 - $23,550	$23,551 - $29,437	$29,438 - $35,325	$35,326 - $41,212	$41,213 - $47,100	$47,101 and over
5	$0 - $27,570	$27,571 - $34,462	$34,463 - $41,355	$41,356 - $48,247	$48,248 - $55,140	$55,141 and over
6	$0 - $31,590	$31,591 - $39,487	$39,488 - $47,385	$47,386 - $55,282	$55,283 - $63,180	$63,181 and over
7	$0 - $35,610	$35,611 - $44,512	$44,513 - $53,415	$53,416 - $62,317	$62,318 - $71,220	$71,221 and over
8	$0 - $39,630	$39,631 - $49,537	$49,538 - $59,145	$59,146 - $69,352	$69,353 - $79,260	$79,261 and over
each additional add	$4,020	$5,025	$6,030	$7,035	$8,040	

Three Styles of Mediation

Mediation is a process that can be conducted in three ways that vary in formality, goals, the mediator's techniques, and outcomes. Listed from more formal to less formal, the styles of mediation are: settlement conference, facilitative, and transformative.

A settlement conference is the most formal style and is conducted primarily by attorney-mediators. Its goal is settlement, the attorneys tend to speak for the clients, the mediator often separates the parties and their attorneys into separate rooms, and the mediator may give an opinion regarding the likely outcome of the case in court. The mediator may not have had mediation training.

A facilitative mediation is less formal and is conducted by trained mediators who often are not attorneys. The mediator's goals include improving the relationships of the parties as well as settlement. The parties and their attorneys often remain in the same room, although the mediator uses communication skills and techniques to separate the people psychologically from the problem. The mediator does not give an opinion about the outcome of the case in court but instead explores the parties' interests and feelings to achieve a mutual understanding as a foundation for an agreement.

A transformative mediation is the least formal process. The parties are invited to shape the mediation process and they lead it while a trained mediator assists them. The mediator's goals are empowerment of the parties and helping the parties to recognize the options that are available to them within the conflict situation. The mediator's techniques include restating, reframing, identifying emotions and open-ended questions. While settlement may occur, that is a secondary goal for the mediator.

OBJECTIONS TO MANDATORY MEDIATION

1. *Divorcing parents aren't ready to mediate at the beginning of the case. They need time to get over the strong emotions that come with a break-up.*

Litigation never makes people feel more kindly towards each other. Typically, the longer it lasts the worse they feel. In the words of 19th century cynic Ambrose Bierce, "A lawsuit is a machine into which you enter as a pig and depart as a sausage." Litigation makes the parties angrier, more defensive and more aggressive—until they run out of money and have to throw in the towel. Under the proposed legislation, mediation need only be commenced within sixty days, not concluded. If there are issues like locating one of the parties or exchanging basic information, that can be handled either during the sixty-day period or even after mediation is initiated.

2. *Mediation just adds an expense to an already-expensive process.*

Because mediation has such a high success rate, it saves the parties thousands of dollars that otherwise would be devoted to depositions, experts and legal fees. One study estimates that the cost of divorce is an average of $20,000 per person, while the total cost of mediation for all issues in the divorce, including parenting, is $2,000-5,000. Even if the case doesn't settle all issues, it will narrow the area of disagreement to something more manageable, and less expensive to resolve.

3. *Only poor or pro se litigants should be required to mediate.*

There is no valid reason to make the courts the exclusive domain of those who can afford lawyers, and to do so is probably unconstitutional under the Equal Protection and Due Process clauses.

4. *Mandatory mediation will economically damage divorce lawyers.*

Most parenting disputes are litigated without lawyers (or just one), so the impact will be slight in any event. The social cost of overcrowded courts and warring parents should be weighed against the potential loss of income to the bar.

5. *We don't have enough trained mediators to handle the projected caseload.*

Montana needs to undertake an intensive campaign to insure that each jurisdiction has enough mediators to handle the thousands of parenting cases that mandated mediation will generate. Family lawyers, especially younger lawyers, will jump at the opportunity to expand their practice. While there are qualified mediation trainers in Montana, it would be helpful to provide funding for training programs so that its cost will not be a deterrent. It may be necessary to subsidize mediation in Eastern Montana, where the resources are very limited, so that the courts can offer "mediation days" services by mediators from elsewhere in the state. Rural jurisdictions may also make use of telephone mediation, Skype mediation and other creative adaptations.

6. *Why use special masters? That what we have judges for.*

A special master or standing master can conduct a streamlined hearing and will be accountable for making a prompt decision. This gives each party their "day in court" without having to wait for months or even years for a decision. The field of "private judging" is exploding across the country and has been proven to be an excellent way to free up the courts for trials that require the full attention of the judiciary.

7. *Mediation isn't effective where there is a difference in power between the two parents.*

Actually, this is exactly why a mediator can be so effective—a well-trained mediator knows how to level the playing field and make sure both sides can be heard. Domestic violence cases, except with informed consent, are exempt from mediation.

8. *The courts are essentially free. Why should litigants have to pay for the services of a mediator?*

There is a general consensus that people tend to appreciate that in which they invest. Whether or not this is true, the budget cuts to legal services over the past decades requires us to shift the costs of resolution to the parties to the extent it is practical to do so. Each jurisdiction needs to establish a fee schedule that allows people of all income levels to participate in mediation, and mediators need to be willing to adjust their fees accordingly.

PROPOSED

40-4-309. Early mediation of parenting disputes.

(1) Each judicial district shall issue a local rule that mandates early mediation of all cases involving the parenting of a child, except as provided in §40-4-301(2). Such mediation shall be initiated no later than sixty (60) days after filing a petition for temporary or permanent child support, for enforcement of an existing child support order, for the entry of an interim or permanent parenting plan or for modification of an existing parenting plan.

(2) If the mediation fails to produce an agreement on all disputed parenting matters, the local rule may provide that the matter be submitted to a special master or standing master for resolution pursuant to Rule 53 of M.R.C.P. The court shall establish minimum standards for the appointment of a special or standing master, including familiarity with family law and extent of judicial experience.

(3) Each judicial district shall maintain a list of Certified Family Mediators who meet the minimum qualifications set forth in 40-4-307 and, in addition, have at least 40 hours of training in basic mediation, plus training in family law, domestic violence, early child development and substance abuse; provided that a court may waive these requirements for good cause shown. Parties may select any mediator who meets the minimum qualifications set forth in 40-4-307. If the parties have not agreed to the selection of a mediator within seven days of issuance of the order of referral, the court shall appoint a Certified Family Mediator on a random, rotating or other equitable basis.

(4) The parties shall share the costs of the mediation and special or standing master in accordance with a fee schedule to be established by the court and based on the income and resources of the parties. To be eligible for appointment by the court a mediator or special or standing master must agree to comply with the court's fee schedule.